

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Application of Wisconsin Energy Corporation)	
for Approval to Acquire the Outstanding)	Docket No. 9400-YO-100
Common Stock of Integrys Energy Group,)	
Inc.)	

INITIAL BRIEF OF THE ENVIRONMENTAL LAW & POLICY CENTER

I. INTRODUCTION

The Public Service Commission of Wisconsin (“Commission”) must determine whether approving the application of Wisconsin Energy Corporation (“WEC”) to acquire Integrys Energy Group (“Integrys”) “is in the best interest of utility consumers, investors, and the public.” (Wis. Stat. § 196.795(3)) Intervenor Environmental Law & Policy Center (“ELPC”) requests that the Commission deny WEC’s application unless WEC agrees to limit its ownership of American Transmission Company, LLC and ATC Management Inc. (collectively “ATC”) to Integrys’s current ownership interest of 34.07%. The Commission should require WEC to dispose of any interest of ATC above 34.07% upon completion of the merger. Alternatively, the Commission should limit WEC’s voting power in all ATC matters - including fundamental corporate matters - to Integrys’s current voting power of 34.07%.

ATC owns, plans, constructs, operates, maintains, and expands transmission facilities in Wisconsin and the Upper Peninsula of Michigan (“U.P.”). The goal of creating ATC, a single transmission company made up of many utility owners, was to prevent a single utility from dominating Wisconsin’s transmission landscape. The current structure of ATC allows utilities to maintain an ownership interest in transmission infrastructure while eliminating vertical electric utility monopolies in Wisconsin. Under the current structure, no single ATC member has

majority ownership of the company. However, the proposed merger will join WEC's 26.24% ownership with Integrys's ownership interest of 34.07%, increasing WEC's majority ownership of ATC to 60.31%.

No single utility should be allowed to solely shape the transmission infrastructure of Wisconsin. Majority ownership of ATC raises the risk that WEC will use ATC to support its own interests, including those in the U.P., rather than the interests of the citizens of Wisconsin. Such an outcome violates Wisconsin law, is against the public interest, and is inconsistent with the purpose of ATC requiring it to "support[] effective competition in energy markets without favoring any market participant." (Wis. Stat. § 196.485(1)(ge)) Further, WEC's proposal to surrender its voting power over all but "fundamental corporate matters" does not go far enough to protect the public interest. As explained below, these fundamental corporate matters include the ability to sell ATC to a third party and modify ATC's governing documents. Control over ATC's fundamental corporate matters by a single utility is not in the public interest. Therefore, even if the Commission allows WEC to own the majority of ATC, the Commission should limit WEC's voting power in *all* ATC matters to 34.07%.

Ultimately, WEC has not sufficiently demonstrated that retaining majority ownership of ATC is in the public's best interest and is compliant with Wisconsin law. The Commission should limit WEC's ATC ownership to Integrys's current ownership interest of 34.07% or require WEC to limit its voting rights over all matters to 34.07%.

II. ARGUMENT

A. Majority Ownership of ATC Violates Wisconsin Law and the Purpose of ATC.

Consistent with 1999 Wisconsin Act 9, the Commission approved ATC's creation in order to "provide an adequate and reliable transmission system that meets the needs of all

transmission users and that supports effective competition in energy markets without favoring any market participant.” (Certificate of Authority and Final Decision, *In the Matter of the Organization of American Transmission Company, LLC*, Docket No.137-NC-100, Public Service Commission of Wisconsin, December 22, 2000) The authorizing legislation provided an alternative to utilities that wished to neither transfer control of their assets to an independent system operator nor divest their transmission interests to an independent transmission owner. The law presented a third option: divestment of utilities’ transmission assets in a new third-party company in exchange for part ownership in that company. It was under this new law that the Commission approved ATC’s creation. Today, ATC is owned by 29 utilities that have divested their transmission assets into the company in exchange for ownership. (Ex.-PSC-Hubert-1, Schedule 5)

Wisconsin law states that ATC’s purpose is:

the planning, constructing, operating, maintaining and expanding of transmission facilities, and the providing of transmission service, to provide for an adequate and reliable transmission system that meets the needs of all users that are dependent on the transmission system and that supports effective competition in energy markets without favoring any market participant.

(Wis. Stat. § 196.485(1)(ge)) Crucially, the law requires ATC to meet the needs of *all users* without favoring any market participant. To this end, ATC must be a member of and submit to oversight by the Midcontinent Independent System Operator (“MISO”), which is the regional transmission operator (“RTO”) in Wisconsin and much of the Midwest. (Wis. Stat. § 196.485(1)(m)) Though MISO is the final arbiter of what transmission ATC will ultimately construct and how that transmission will operate, ATC still plays a significant planning, construction, and operations role.

Of the current 29 ATC members, no company has controlling ownership. Currently, Integrys owns 34.07% and WEC owns 26.24%. The next largest owner is WPL Transco LLC with 16.38%. However, as stated above, the proposed merger will increase WEC's ownership interest in ATC from 26.24% to 60.31%, giving it majority ownership over ATC.

WEC's proposed majority ownership is counter to the intent of the law and Commission precedent. As Commission Staff Witness Pilo explained, "the ownership set up [of ATC] was such that no single entity was a majority owner of ATC capable of 'reaching in' and exercising any vertical market power abuse through means that simple RTO membership and RTO oversight might not prevent." (Direct-PSC-Pilo-11) While WEC briefly had a 51% control over ATC when the company was created in late 2000, the Commission approved such an ownership structure with the knowledge that Wisconsin Public Service Corporation was set to join ATC shortly thereafter, thereby eliminating WEC's majority. (Direct-PSC-Pilo-11, footnote 2) The merger in this case would make WEC the first permanent majority owner of ATC. As Witness Pilo put it, "This is a departure from the environment that allowed the creation of ATC." (Direct-PSC-Pilo-12) The purpose of Wisconsin's late 1990's legislation was to eliminate vertically integrated utilities in Wisconsin. WEC's proposal would put WEC in a position to leverage ATC's virtual monopoly over Wisconsin transmission for its benefit and to the detriment of everyone else in the state. For example, as detailed below, WEC might use its influence on ATC to meet its obligations in the U.P. regarding the Presque Isle Power Plant. It is counter to the intent of the law and the company's 15-year history of effectiveness.

B. Majority Ownership of ATC is not in the Public Interest.

Allowing WEC, or any other company, to have majority ownership in ATC will not serve the public interest. WEC proposes to eliminate concerns over its proposed majority ownership by

limiting its voting power to 34.07% on all matters requiring a vote “other than with respect to certain fundamental corporate matters.” (Application-17) Fundamental corporate matters include:

(1) a sale of all or substantially all of the assets of ATC; (2) a change in control of ATC or the Manager; (3) bankruptcy; (4) an initial public offering; (5) the merger or consolidation of ATC with, or a proposal to acquire all or substantially all of the assets of, another company; and (6) any proposal to amend ATC’s or the Manager’s governing documents that would reduce the combined company’s rights as a member or shareholder.

(Application-17, footnote 12) WEC argues that under this voting restriction the combined company “will have the same influence that Integrys does today on matters affecting the management, operations or planning activities of ATC.” (Application-17) The owners unaffiliated with the combined company will vote the remaining 26.24% of the combined company’s ownership. (Application-17) WEC states that this restriction on voting power will extend to election of the directors of ATC Management. (Application-18)

WEC’s proposal to limit only some of its voting power is insufficient. As Witness Pilo explained, “[H]aving the applicant (WEC) own 60 percent of ATC essentially amounts to the creation of a vertically-integrated company with complicated, likely redundant management structure that begs the question whether a new VITO [vertically integrated transmission owner] should just be created.” (Direct-PSC-Pilo-13) This is clearly contrary to the purpose of ATC, which, as explained above, was created in part to eliminate vertically integrated utilities in Wisconsin. While WEC’s proposal would in theory mitigate some of the negative impacts on the public of having a majority ATC owner, as Commission Staff Witness Hubert explained, it does not eliminate the problems of having a majority owner, nor does it curb enough of WEC’s voting power.

The fundamental corporate matters WEC intends to control could have significant impacts on the other ATC owners and their customers. As Witness Hubert explained, “The fundamental corporate matters that WEC proposes to protect with retained ‘defensive’ voting rights would have significant impact on the other 27 remaining members and their \$423 million book value (\$1.480 billion market value) investment.” (Direct-PSC-Hubert -26) For example, WEC would control whether or not another company purchases ATC, essentially allowing WEC to tailor such an acquisition to benefit WEC rather than all of the utilities and their customers. Further, any transfer of WEC’s ownership to another company would not necessarily transfer ATC’s promise to limit its majority voting rights to “fundamental corporate matters.” (Direct-PSC-Hubert-30) WEC would also control ATC’s governing documents. This could have significant long-term effects on Wisconsin customers and utilities by granting WEC the ability to change the very nature of how ATC operates going forward. These majority voting powers “result in ATC’s ownership interests essentially being under the control of only one company.” (Direct-PSC-Hubert-27)

While ELPC believes that the Commission should at least restrict all of WEC’s voting rights, even on fundamental corporate matters, voting rights are not the only concern with granting WEC majority ownership of ATC. WEC Witness Reed argues that the “scale, operational expertise and financial resources” of the combined companies will provide WEC with the ability to “more effectively represent the interest of the states in which it operates and maintain its independence in a consolidating industry.” (Direct-WEC-Reed-40) While Witness Reed is correct that the merger will grant WEC considerably more influence, including over transmission issues at the regional level, as Witness Hubert notes, “this informal influence . . . is only a benefit to entities who share the position of the influential entity, in Mr. Reed’s example,

WEC Energy.” (Direct-PSC-Hubert-23) In other words, it grants WEC too much influence and puts it in position where its voice will be heard above all others on transmission matters.

One place that WEC might seek to influence ATC is in its ongoing obligations in the U.P. with regard to the Presque Isle Power Plant (“PIPP”). PIPP is a WEC owned generating plant in the U.P. that must run in order to maintain reliability in the area. On March 12, 2015, WEC entered into a settlement agreement with the parties, including Michigan Public Service Commission staff and the Michigan Attorney General, regarding its proposed merger with Integrys. In the settlement agreement, WEC is required to operate PIPP until it can shut down without causing reliability issues. Importantly, WEC cannot rely on System Support Resource payments from MISO in order to mitigate any losses it might suffer from the operation of PIPP. (Ex.-PSC-Hubert-6, Schedule 1, page 3) The settlement agreement contemplates a new generating unit to replace PIPP, and to that end WEC agreed to “advocate within American Transmission Company, LLC to ensure that studies regarding the necessary configuration of the Plant in order to replace PIPP from a transmission planning point of view proceed fairly and expeditiously.” (Ex.-PSC-Hubert-6, Schedule 1, page 7) WEC, therefore, has a strong incentive to use the formal and informal influence that it will have as the majority owner to shape ATC’s planning responsibilities to benefit U.P. interests. If those interests are at odds with Wisconsin utilities and citizens, then WEC will be in a position to potentially wield its majority ownership influence on ATC in ways that are not in the best interest of the Wisconsin public.

This strong informal influence is why Staff Witness Hubert took the position “that a simple voting limitation is inadequate” to adequately control WEC’s power over ATC as a majority owner. (Direct-PSC-Hubert-31) ELPC agrees with Witness Hubert’s proposal that the Commission should go beyond limiting WEC’s voting power to 34.07% on all matters. Instead,

the Commission should limit WEC's ownership of ATC to 34.07%. (Direct-PSC-Hubert-32)

III. CONCLUSION

WEC has failed to demonstrate that the proposed merger with Integrys "is in the best interest of utility consumers, investors, and the public." (Wis. Stat. § 196.795(3)) Specifically, WEC has failed to demonstrate that its majority ownership complies with Wisconsin law eliminating vertically integrated transmission utilities. WEC's proposal to limit its voting power on all but fundamental corporate matters to 34.07% does not eliminate the undue influence, both formal and informal, that WEC would wield over the actions and priorities of ATC. The Commission should only approve the merger if WEC agrees to divest of all ATC ownership above 34.07% following the completion of the merger. If the Commission is unwilling to put that requirement on the merger, then the Commission should require WEC to limit its voting rights on all matters – including fundamental corporate matters – to 34.07%.

Dated this 30th day of March 2015.

Respectfully submitted,

/s/ Justin Vickers

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